ABDILLAH SULAIMAN & ANOR.

v.

DATARAN HIJAU SDN. BHD. & ORS.

HIGH COURT BORNEO, KUCHING
JOHN CHONG YIK LIONG J
[COMPANIES WINDING-UP NO. 2 OF 1979]
16 MAY 1983

COMPANY LAW: *Valuation of shares - Not "fair value" order - Effect.*

The petitioners, who were minority share holders in the first respondent company, and who had petitioned for the winding up of the company withdrew the petition on a consent order being made. It was tendered, *inter alia*, that the respondents buy up all the petitioner's shares in the company at a fair value to be assessed by Mr. Liew Tow Chen. A valuation report was prepared. The petitioners were dissatisfied with the valuation and applied under O. 45 r. 11, to the Court for the following orders:

1. That the consent order be stayed and
2. that Mr. Liew be ordered to produce the figures used by him in arriving at the valuation.

The grounds of the application were (i) that this valuation was not a fair value (ii) that Mr. Liew did not have regard to paragraph 6 of the consent order and (iii) that the valuation report did not state in full the method of computation of the share value.

Held:

A. Regarding the application for the first order

[1] The Court would deal with the application under O. 45 r. 11. It was necessary for the Court to consider whether the matters contained in either of the first two grounds were matters falling within the ambit of O. 45 r. 11. The matters must be those which "have occurred since the date of the judgment or order" and the judgment being given or the order being made or which would have led to stay of execution if they had already occurred at the date of judgment or order.

[2] Order 45 r. 11 did not empower the Court to grant a stay of execution in the case before the Court.

(i) The matters complained of in the first ground are not matters which fall within the ambit of O. 45 r. 11. The petitioners and respondents were all parties to the consent order and the valuation was binding on them. An order by consent is evidence of the contract between the parties and is binding on them unless and until it is set aside in proceedings duly instituted for that purpose.

(ii) With regard to the second ground, there was nothing in the valuation report which could be taken to suggest that there was non-compliance in paragraph 6 of the consent order.

(iii) Even if the matters complained of in the second ground were *prima facie* shown to exist, the Court would not have granted the first order sought in the application, which was somewhat premature.

The petitioners should have first taken proceedings for setting aside the valuation for the alleged non-compliance and then applied for a stay of execution of the consent order pending the determination of the issue. Order 45 r. 11 does not confer upon the Court the power to grant a permanent stay of the consent order, which in fact was what the petitioners were asking for.

B. Regarding the application for the second order

There was no merit in the application. The consent order gave Mr. Liew unfettered discretion to give his valuation in either a speaking or non-speaking report. In the circumstances of the case, the valuation was final and binding.

[Application dismissed.]

Cases referred to:
London Permanent Benefit Building Society v. De Baer [1968] 1 All ER 372
Kinch v. Walcott & Others [1929] All ER 720

Legislation referred to:
Rules of the High Court 1980, O. 45 r. 11

Other sources referred to:
Supreme Court Practice, [1979] Vol. 2 para. 2010 & 2011

For the petitioners - John Ko; M/s. Battenberg & Talma
For the respondents - K.J. Foo; M/s. Ee & Lim

JUDGMENT

Chong Yik Liong J:

The petitioners were the minority shareholders in the first respondent company, Dataran Hijau Sdn. Bhd. (hereinafter called "the company'). They presented a joint petition in this Court on 18 December 1979 against the company for a winding-up order, and alternatively for an order that the majority shareholders should buy their shares in the company at the price of RM100 per share. The majority shareholders are the other respondents herein, (hereinafter called "the respondent") and they in conjunction with the company opposed the said petition.

When the petition came on for hearing before Tan J on 26 January 1981 the parties, however, decided not to proceed with the battle on the petition and, as a result, a consent order was made on the said date whereby it was ordered, *inter alia*, that the said petition be withdrawn; that the respondents buy up all the petitioner's shares in the company at a fair value as at 7 January 1981 to be assessed by Mr. Liew Tow Chen of Messrs. Liew & Co. Kuching, and that the petitioners execute transfers of their shares in favour of the respondents and/or their nominees within 14 days of the issue by Mr. Liew of the share valuation report.

A share valuation report dated 30 March 1982 was prepared and submitted to this Court by Mr. Liew, and a copy of the said report was also extended to the parties' respective solicitors. In the said report, Mr. Liew valued the RM1 fully paid shares in the company at RM3.70 per share as at 7 January 1981, upon the basis of the records and information therein referred to.

The petitioners now apply by way of a summons in chambers for the following orders:

(1) that the carrying into effect of the said consent order be stayed;

(2) that the valuer Mr. Liew Tow Chen be ordered to produce the figures used by him in arriving at the valuation of the shares in the company.

(3) alternatively, that the petitioners be at liberty to buy the respondent's shares in the company at RM4 per share.

In the course of the arguments, Counsel for the petitioners withdrew the application for order (3). The grounds of the application for the remaining orders were (i) that the valuation made by Mr. Liew Tow Chen was not a "fair value"; (ii) that Mr. Liew did not appear to have had regard to paragraph 6 of the said consent order; and (iii) that the valuation report did not state in full the method of computation of the share value. In support of the application three affidavits were filed, namely:

(a) the affidavit of Abdillah Sulaiman dated 14 April, 1982 in which it was deposed that the valuation given by Mr. Liew was not a "fair value" and was far below the actual value of the shares in the company; that Mr. Liew's valuation report did not contain any details of the figures used by him in arriving at his valuation, and that Mr. Liew had not complied fully with the terms of clause 6 of the said consent order;

(b) the affidavit of Mr. John Ko dated 20 July 1982 in which he deposed that Messrs. Liew & Co. had refused to supply the detailed calculations used in the valuation of the shares in the company; and

(c) the affidavit of Mr. Kho Yaw Huat, a chartered accountant, dated 31 January 1983 in which he deposed that he prepared a valuation report of the shares of the company, a copy of which was annexed thereto, on the instructions of Messrs Battenberg & Talma on behalf of the petitioners, and that it was his opinion based on his report that the fair value of each share in the company was RM6.31 as at 7 January, 1981.

Counsel for the respondents raised a preliminary issue that there was no basis upon which the application for order (1) could be made and submitted that the proper procedure should have been for a fresh action to be taken by the petitioners to set aside the said consent order. Be that as it may, I propose to deal with the application which, as Counsel for the petitioners said, was made under O. 45 r. 11 which, *inter alia*, provides as follows:

> .... a party against whom a judgment has been given or an order made may apply to the Court for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order, and the Court may by order grant such relief, and on such terms, as it thinks fit.

Undoubtedly, O. 45 r. 11 gives the Court power to grant the relief therein referred to, but the power to do so can only be exercised "on the ground of matters which have occurred since the date of the judgment or order". The matters referred to in that rule must be matters which would have prevented the judgment being given or the order being made or which would have led to a stay of execution if they had already occurred at the date of the judgment or order: see *London Permanent Benefit Building Society v. De Baer* [1968] 1 All ER 372. Thus, it becomes necessary for me to consider whether the matters contained in either of the first two grounds are matters falling within the ambit of that rule.

The first ground alleged that the value of the shares as assessed by Mr. Liew was not a "fair value". The petitioners sought to prove that it was not a fair value by showing a substantial discrepancy between Mr. Liew's valuation and the subsequent valuation obtained by them from their own valuer, Mr. Kho Yaw Huat. However, for the purpose of the present application, I do not think there is any need for me to determine the issue raised in this ground, nor do I think it is open to the petitioners to raise it in view of the fact that Mr. Liew's valuation was the result of an agreement between the parties herein as evidenced by

the said consent order. The law on and the effect of consent orders are well settled. An order by consent is evidence of the contract between the parties, and is binding on the parties to the order unless and until it is set aside in proceedings duly instituted for that purpose: see paragraph 2010 and 2011 of the 1979 *Supreme Court Practice*, Vol. 2; and it also operates as an estoppel *Kinch v. Walcott & Others* [1929] All ER 720. In this case, the petitioners and the respondents were all parties to the said consent order which, amongst other things, evidenced their agreement that the fair value of the shares in the company should be assessed by Mr. Liew on whom they agreed, and that Mr. Liew's valuation should be final and binding on them and there should be no appeal from it (see paragraph 3, 5 and 7). Now, Mr. Liew had given his valuation, and although he gave it in a non-speaking report, his valuation was binding on the parties herein by reason of their agreement to be so bound as evidenced by the said consent order. It was not open to either of them to impeach it, simply because they had agreed to be bound by it. Clearly, the matters complained of in the first ground wholly arose from the dissatisfaction on the part of the petitioners with Mr. Liew's valuation, and I am of the view that they are not matters which fall within the ambit of O. 45 r. 11, for Mr. Liew's valuation was not something which the petitioners had not expected or could not have expected at the time when the said consent order was made; in fact, the said consent order clearly indicates that they had agreed to be bound by whatever figure that might be fixed by Mr. Liew as being the fair value of the shares in the company.

With regard to the second ground, it was said that Mr. Liew had not complied with paragraph 6 of the said consent order, which required Mr. Liew to take into consideration all the matters therein referred to in making his assessment as to the fair value of the shares in the company. In his affidavit, Abdillah Sulaiman merely asserted that Mr. Liew had not complied fully with the terms of clause 6 of the said consent order. This, in my view, is no more than a bare assertion and is wholly devoid of substance when considered in the light of Mr. Liew's share valuation report, a copy of which was exhibited to the affidavit of Abdillah Sulaiman. In my view, there was nothing in Mr. Liew's valuation report which could be taken to suggest that there was such non-compliance indeed, it is explicitly clear from item (6) of his valuation report that Mr. Liew had taken into consideration all the matters referred to in paragraph 6 of the said consent order.

I would add that even if the matters complained of in this ground were *prima facie* shown to exist, I would nevertheless feel disinclined to exercise my discretion to grant the first order sought in this application which I consider to be somewhat premature. The alleged non-compliance might well afford a ground for vitiating Mr. Liew's valuation upon which the enforceability of the order for the transfer of shares as embodied in the said consent order depends. In such a case, the remedy available to the petitioners in the first instance was to take proceedings to set aside Mr. Liew's valuation, so that evidence thereon could be called and the issue determined and not to apply for a stay of execution, for until Mr. Liew's valuation was set aside it remained final and binding on the parties and therefore the said consent order relating to the transfer of shares became enforceable. Here, petitioners attempted to circumvent this by applying for a stay of execution, and I simply feel it was not right for them to do so. A stay of execution must necessarily be of a temporary nature: it means the execution or carrying into effect of a judgment or order is temporarily suspended until for example the happening of certain specified events or the completion or fulfilment of certains acts or conditions. Here the petitioners were asking for a stay *simpliciter*, and to grant their application in this case would be tantamount to a grant of a permanent stay of execution in the said consent order, and I do not for one moment think that O. 45 r. 11 confers upon the Court power to grant a stay which has the effect of permanently rendering the said consent

order unenforceable or ineffective. What the petitioners should have done in this case was first to take proceedings for setting aside Mr. Liew's valuation for the alleged non-compliance and then apply for a stay of execution of the said consent order pending determination of the issue, and this application would then be considered by the Court on its merits, so that if stay was granted, it would be of a temporary nature pending the final disposal of the said proceedings.

In my judgment, I find that no matters have occurred in this case since the date of the said consent order which could have prevented that order being made or which could have led to a stay of execution if they had already occurred at the date when that order was made. It follows, therefore, that O. 45 r. 11 does not empower the Court to grant a stay of execution in this case.

I now come to the application for order (2), i.e Mr. Liew be ordered to produce the figures used by him in arriving at the valuation of the shares in the company. The ground relied on in support of this application is that Mr. Liew's valuation report did not state in full the method of computation of the share value. I see no merit in this application, nor do I see any substance in the argument advanced for the petitioners that Mr. Liew's refusal to supply the figures supported the allegation that the value of the shares given in his valuation report was not a fair value, thereby implying that the petitioners were entitled to their production to enable them to verify whether Mr. Liew had made a fair valuation of the shares. The said consent order by which the parties herein had agreed upon Mr. Liew to value the shares in the company, did not specify that Mr. Liew had to state the method of computation in his valuation report, nor did it specifically require Mr. Liew to produce to the parties or either of them the figures used by him to show that he had made a fair valuation of the shares. The said consent order was wholly silent on the form of the report in which Mr. Liew should give his valuation. The implication was, therefore, clear: Mr. Liew had an unfettered discretion to give his valuation either in a speaking report, i.e. one that gives reasons or calculations, or in a non-speaking report, i.e. one that does not give reasons or calculations. Here, Mr. Liew gave his valuation in a non-speaking report, and although he did not state therein the method of computation by which his valuation was arrived at, there was nothing to suggest that, without stating the method of computation, a fair value of the shares in the company could not have been assessed by him on consideration only of the matters specified in his valuation report, and there was no expert evidence led to suggest that it could not. Having given it honestly and in good faith, his valuation was final and binding on the parties by reason of the said consent order, and it was not open to the parties or either of them to reopen it or to require disclosure of the reasons or calculations for the purpose of impeaching it.

For the reasons stated above, I would refuse to grant the two orders sought in this application and accordingly dismiss the application with costs to the respondents to be taxed.

Also found at [1984] 1 CLJ 48